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Supreme Court, U.S.
FILED

No. 95 15 26 MAR 21 1996

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In The

Supreme Court of the United States

October Term, 1995

RAYMOND SPRINGER,

Petitioner,

v.

CITY OF BEND,
an Oregon municpal corporation,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID C. FORCE
P.O. Box 10972
Eugene, Oregon 97440
Telephone (541) 342-2956
Counsel for Petitioner

DAVID B. SMITH
Counsel of Record
6975 S.W. Sandburg,
Suite 130
Tigard, Oregon 97223
Telephone: (503) 624-9352

88 pp

QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of whether property owners seeking just compensation under the Takings Clause of the Fifth Amendment, after having been forced to litigate state takings claims in state court due to ripeness considerations, may be denied a federal forum for their federal takings claims due to *res judicata*. Since this Court decided *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985), this question has arisen in numerous federal courts across the nation.

Petitioner Raymond Springer - owner of Budget Building and Remodeling, Inc. - brought this action against the City of Bend, contending that a series of the city's land use decisions and the city's denial of his access to a public street, violated the Fifth and Fourteenth Amendments to the U.S. Constitution by imposing a pollution easement on his property, taking his private property without just compensation. The United States Court of Appeals for the Ninth Circuit affirmed the decision of United States District Court for the District of Oregon, granting the City's Motion for Summary Judgment on Mr. Springer's claim. The District Court held that Mr. Springer's federal takings claim was subject to claim preclusion because it could have been brought in earlier state proceedings. The Ninth Circuit denied Mr. Springer's Petition for Reconsideration and Suggestion for Rehearing En Banc.

QUESTIONS PRESENTED FOR REVIEW - Continued

The Ninth Circuit held that claim preclusion can bar a federal court from adjudicating a federal takings claim, even when the prior proceedings in state court involved only state law claims. The question presented is:

Whether litigation of a state law takings claim brought in state court to comply with *Hamilton Bank* can bar a property owner from subsequently litigating a federal takings claim in federal court under res judicata or collateral estoppel?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, CA No. 94-35137 (August 24, 1995), is unreported, as documented at 65 F.3d 176 (1996), and is reproduced as Appendix (App.) A. The Order of the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for a rehearing en banc is reproduced as Appendix B. The opinion of the United States District Court for the District of Oregon granting the city's Motion for Summary Judgment is unreported, and the court's slip opinion

is reproduced as Appendix C. The opinion of the Oregon Court of Appeals affirming the dismissal of Mr. Springer's takings claim, brought under the Oregon Constitution, by the Circuit Court, Deschutes County, is reported at 826 P.2d 1 (1992) and is reproduced as Appendix D. The decision of the Circuit Court of the State of Oregon for the County of Deschutes (Civil No. 88-CV-0187-WE, December 1, 1989) dismissing Mr. Springer's state takings claim is reproduced at Appendix E. The Findings and Recommendations of the United States District Court for the District of Oregon (Civil No. 87-6342, March 1, 1989) finding Mr. Springer's federal takings claim was not ripe, is unreported and is reproduced at Appendix F. The decision of the Circuit Court of the State of Oregon for the County of Deschutes (Civil No. CV-37779, December 17, 1985) denying Mr. Springer declaratory relief is reproduced at Appendix G. The final opinion and order of the Oregon Land Use Board of Appeals, affirming the decision of the City of Bend, denying Mr. Springer's application to dedicate a street, is reported at 14 Or. LUBA 21 (1985) and is reproduced at Appendix H. Page references are to the version in the appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, review of which is sought on petition, was entered on August 24, 1995. The Order of the Ninth Circuit denying reconsideration and rejecting the suggestion for rehearing en banc was entered on December 22, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution, and Article IV, Section 1 of the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." Article IV, Section 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The statutory provision at issue in this matter is 28 U.S.C. § 1738. It provides, in part: "Such Acts, records and judicial proceedings shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

A. Statement of Facts

This is an inverse condemnation action that has been frustrated from its inception by the refusal of the federal courts to hear the merits of Mr. Springer's takings claims.[1] In spite of the fact that his claims in the Oregon Land Use Board of Appeals and the Circuit Court of Oregon in 1985 attacked the validity of the city's decision under the city's ordinances and comprehensive plan, and raised no takings

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[1] Mr. Springer's takings claims contended that the City of Bend (city), by engaging in a pattern and practice of refusing to allow development of his property, including denying him a permit to extend a public street across his property and compelling him to restrict the uses of his property to those acceptable to Diamond International, Inc., took a pollution easement in his property, which resulted in the taking of his private property for public use without payment of just compensation. Only the Circuit Court for Deschutes County adjudicated the merits of these claims:

> With regard to the merits, I find that the City and the Municipal Defendants must prevail also. It's clear from the record that the City did approve the conditional use permit and the site plan; that the only denial that the City issued was access to Division Street. . . . . .
>
> I also don't believe that the . . . Plaintiff can meet the criteria for a regulatory taking based upon the facts which I've already recited and the Plaintiff's deposition testimony.

App. E-6 - E-7.

arguments,[2] the state and federal courts thereafter concluded that his subsequent state and federal takings claims were barred by not having been raised in those proceedings in 1985. The Ninth Circuit affirmed that conclusion.

Mr. Springer had purchased the property in 1978 on a land sales contract; the city annexed the property in 1979.[3] The city zoned the property light industrial. In June of 1979, Mr. Springer submitted to the city an application for a zone change and amendment to the city's comprehensive plan to change the designation of the subject property from industrial to commercial. After the city's planning staff had recommended denial, the city planner persuaded Mr. Springer to withdraw the application. During March of 1982, Mr. Springer again applied to the city for a zone change and conditional use permit to allow construction of a bowling center, with an estimated value of $3 million, on his 7.4 acre parcel.

The property was bordered on the east by Second Street and on the west by First Street. First Street was subsequently improved as an arterial, and renamed S.E. Division Street, a state highway. The city limits are at the western edge of the property. SE Division Street lies outside the city limits, in Deschutes County. Urania Lane,

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[2] Mr. Springer did raise a procedural Due Process claim under the Fourteenth Amendment to LUBA. Petition for Review at 21. *Springer v. Bend City Commission*, 14 Or. LUBA 21 (1985).

[3] On October 20, 1982, Mr. Springer had applied to the city for a conditional use permit and zone change to establish an office building for the U.S. Forest Service on the subject property. On May 16, 1983, the city's hearings officer denied those applications.

approaching the property from the east, intersected Second Street about midway between the northern and southern boundaries of the property. Urania Lane terminated at its intersection with Second Street.

Although Division Street was a state highway, and was in Deschutes County, the city held title to the street. In 1980, the street, which purportedly had been a private road, was dedicated to the city by Brooks-Scanlon, Inc.. The dedication instrument purportedly reserved to Brooks-Scanlon a 1-foot wide strip between the street and the subject property. The dedication instrument also included a condition prohibiting access to the road except at several points reserved for Brooks-Scanlon.[4] Sometime thereafter, Brooks-Scanlon conveyed all of its interests to DAW Forest Products, Inc. and Brooks Resources, Inc.

The city approved the zone change, conditional use permit, and site plan for the bowling center in 1983.[5]

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[4] During the subsequent proceedings, Mr. Springer learned that Division Street had never been a private road, and had been dedicated to the county at the time of its creation in 1940 without any reserved conditions. Thus, the 1-foot strip and access restrictions reserved to Brooks-Scanlon did not exist because they were never legally created. *See* App. E-8 - E-9.

[5] Before the city council would act on Mr. Springer's application, the city council required first Mr. Springer to enter into an agreement with Diamond International, Inc., owner of the land across S.E. Division street to the west of the subject property. That agreement, known as the "Diamond Agreement," effectively gives Diamond, and its successor in interest, DAW Forest Products, authority over the uses to which the subject property may be put. Mr. Springer executed this agreement under protest. The city council then required Mr. Springer to sign a separate agreement, known as the Springer Property Agreement, which

Thereafter, Mr. Springer, in order to have adequate access for the bowling center from the state highway, applied to the city to have Urania Lane extended across his property to intersect with the state highway, S.E. Division Street, at the western edge of the property.[6] The city denied that application in 1985.

Unable to secure the requisite financing for the bowling center, which lacked access to the state highway, Mr. Springer sought alternative uses and buyers for the property, including a golf cart sales and leasing facility, a motel, and a lumber yard. All of these buyers were dissuaded from even applying for city permits, much less acquiring the property, due to the lack of access to the state highway, and the restrictions in the Diamond Agreement. Thereafter, in April, 1986, convinced that the city's application of the Diamond Agreement would preclude him from making any beneficial use of the property, Mr. Springer relinquished title to the property to the contract seller. Plaintiff's Affidavit and Exhibits in Response to Defendant's Motion for Summary Judgment at 16-18, *Springer v. The City of Bend*, Civil No. 92-6347-HO (D.Or. Jan. 27, 1994).

B. Proceedings Below

This action was originally commenced when Mr. Springer filed on December 20, 1984, in the Circuit Court of Oregon for Deschutes County, a declaratory judgment and

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gave Willamette Industries, Brooks-Scanlon, and the city rights to enforce the Diamond Agreement. Again, Mr. Springer executed this agreement under protest.

[6] Mr. Springer made a joint application with Deschutes County.

write of mandamus action against the city, seeking to have the court invalidate the 1-foot strip and deed restriction in the dedication of the street to the city. The court denied relief on December 17, 1985, holding that there was no justiciable controversy, since even invalidation of the challenged provisions would not in and of itself afford him access to Division Street. *See* App G-3.

While the decision was pending in the Circuit Court, Mr. Springer appealed the city's denial of the dedication to the Oregon Land Use Board of Appeals (LUBA)[7] on April 10, 1985. He contended the denial was erroneous because the city predicated its decision on the 1-foot strip and deed restriction. He also argued that the city's decision violated the due process provisions of the Fourteenth Amendment. In July, 1985, LUBA denied the challenge, holding that the city's decision contained adequate findings and was based on substantial evidence. LUBA declined to reach the merits of the due process claim. *See* App. H-7.

On July 14, 1987, Mr. Springer filed a civil rights complaint in the United States District Court for the District of Oregon under 42 U.S.C. § 1983. In it he contended that city's actions with regard to his property effectively took his property as a buffer or pollution easement in favor of DAW Forest Products (the successor in interest to Diamond International, Inc.), located across S.E. Division Street. He claimed a taking in violation of the Fifth and Fourteenth Amendments, and a violation of the Equal Protection clause of the Fourteenth Amendment. Thereafter, agreeing the

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[7] LUBA is a 3 referee panel of attorneys appointed by the state's Governor. LUBA has sole jurisdiction over final land use decisions of cities and counties under Oregon Revised Statutes (ORS) 197.825.

federal taking claim was not ripe under this Court's decision in *Hamilton Bank*, Mr. Springer dismissed that claim, without prejudice. On March 8, 1989, the District Court granted the city's Motion for Summary Judgment, concluding that the Equal Protection claim was barred by the preceding state decision.

After dismissing his federal taking claim, and to comply with the mandate of *Hamilton Bank*, Mr. Springer returned to the Circuit Court for Deschutes County on May 31, 1988. There he alleged, *inter alia*, that the city's actions were a taking under Article I, section 18 of the Oregon Constitution.[8] The court rejected that claim and granted the city's Motion for Summary Judgment. The court held that any taking by the city was complete at the time of Mr. Springer's appeal to LUBA in 1985, and thus his state taking claim was barred by that earlier proceeding. App. E-5. Nonetheless, the court did hold there was no regulatory taking under the Oregon Constitution. App. E-7.[9] The Oregon Court of Appeals affirmed the decision that the claim was barred, never addressing the merits of the regulatory taking

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[8] Although Mr. Springer's complaint in state court originally contained both state and federal constitutional inverse condemnations claims, on August 18, 1989 he filed his Fourth Amended Complaint. That complaint deleted the federal takings claim, leaving the state takings claim as the First Claim for Relief. The court's subsequent regulatory takings decision was made on that First Claim for Relief in the Fourth Amended Complaint on December 14, 1989. *See* App. E-7.

[9] The court later concluded that the "Springer Agreements" (Diamond Agreement and Springer Property Agreement) "could certainly be construed to create a pollution buffer and they were certainly designed to have the effect of prohibiting the limitation of the operations of the [Diamond] mills for pollution reasons." App. E-10.

decision, App. D-4, and the Oregon Supreme Court denied review. *Springer v. City of Bend*, 833 P.2d 1283 (Or. 1992).

On , October 7, 1992, Mr. Springer again filed, in the United States District Court for the District of Oregon, a civil complaint alleging deprivation of civil rights under 42 U.S.C. § 1983, alleging a claim of inverse condemnation under the Fifth and Fourteenth Amendments. On the city's motion for summary judgment, the District Court granted summary judgment in favor of the city, entering its judgment on January 27, 1994. The court concluded that "Springer's federal taking claim could have been brought in an earlier state proceeding . . . [and] the claim is now precluded." App. C-10 - C-11.

From that judgment, an appeal was timely filed in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued its order and opinion affirming the decision of the District Court on August 24, 1995. The court held that "Springer could have presented his federal claim to LUBA, and to the state court in Deschutes County I [No. 37779, Dec. 17, 1985, reproduced at App. G]. And this court cannot look behind the state court's decision to that effect in Deschutes County II [No. 88CV-0187-WE, Dec. 14, 1989, reproduced at App. E]. Springer's claim is now precluded." App. A-8 - A-9. On September , 1995, Mr. Springer filed with the Ninth Circuit a Petition for Rehearing with Suggestion for Rehearing En Banc. The Ninth Circuit, on December 22, 1995, denied the petition and rejected the suggestion for rehearing en banc.

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REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on certiorari the circumstance when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. Under Rule 10.1(c), a ground for review exists when a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Both of these grounds for review are present in this case.

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT - WHERE A TAKINGS CLAIMANT FIRST LITIGATES A STATE LAW CLAIM IN STATE COURT TO COMPLY WITH THIS COURT'S DECISION IN *HAMILTON BANK*, MAY A SUBSEQUENT FEDERAL CLAIM IN FEDERAL COURT BE BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL?

The precedent established by the decision below places litigants of takings claims at the sole mercy of state courts to decide the merits of federal takings issues, effectively denying such litigants a federal forum for federal constitutional issues. In no other area of constitutional jurisprudence are civil rights litigants compelled to bring their federal constitutional claims solely in state court. To construe compliance with the ripeness mandates of *Hamilton Bank* as barring federal takings claims from federal court is to relegate such property rights claims "to the status of a poor relation" vis-a-vis the other rights guaranteed in the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 2320 (1994).

The Ninth Circuit based its holding of claim preclusion on this Court's decision in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-85 (1984) (42 U.S.C. § 1983 does not allow a litigant right to seek state court judgment of state claims and then turn to federal court for judgment of federal claims), and on its prior decision in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (issue preclusion may prevent relitigation of takings claim in federal court if same issues were adjudicated in state takings claim in state court). The Ninth Circuit in *Dodd* had relied on this Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980) (federal courts follow traditional doctrines of res judicata and collateral estoppel).

The construction of these cases by the Ninth Circuit directly conflicts with this Court's decision in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 421 (1964), where it was held that there is no requirement "that federal claims be actually litigated in the state courts." In light of the mandate of *Hamilton Bank* that takings claimants must retire to state court and litigate state compensation remedies there, it is the epitome of unfairness to construe *Migra* and *Allen* in such a way as to prevent their return to federal court to fulfill the promise of *Hamilton Bank*, that they may there litigate their ripe federal claims.

The doctrine of ripeness of takings claims finds its origins in the command of the Fifth Amendment that "private property [shall not] be taken for public use without just compensation." This Court has held that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State . . . ." *Williamson Co. Regional Planning v. Hamilton Bank*,

473 U.S. 172, 195 (1985). Thus, "the State action . . . is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.* (footnote omitted).

However, the decision of the court of appeals establishes a pernicious precedent, especially when coupled with its decision in *Dodd*. Together those cases establish that, at least in the opinions of the Ninth Circuit, a federal claim may be barred by prior state court state constitutional litigation by both the doctrine of res judicata and that of collateral estoppel.[10] Both decisions appear to indicate that it may not even be possible to litigate a state law claim in state court and preserve the federal taking claim for federal court through an *England* reservation[11] unless the opposing state or local government assents to that reservation. And, even if local assent is granted, the federal takings issue may still be precluded in federal court through the doctrine of collateral estoppel.

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[10] Mr. Kassouni defines these terms: "Res judicata means 'claim preclusion.' It prevents a plaintiff from seeking further relief on the same claim in a separate action. Collateral estoppel means 'issue preclusion.' It bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties." *See* Charles A. Wright, et al., *Federal Practice and Procedures* § 4402 (1981). Kassouni, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 29 Cal. W. L. Rev. 1, 43 n.259 (1992).

[11] In *England* this Court set forth the rule that when a federal litigant, because the federal court abstains, is compelled to return to state court for adjudication of state claims, she may expressly reserve her federal claims for subsequent litigation in the federal court. 375 U.S. at 420-421.

A. The *Springer* decision requires federal takings claims to be raised in state court.

In the decision below, the Ninth Circuit concluded that Mr. Springer was incorrect in contending that "claim preclusion cannot bar a federal court from adjudicating a federal claim when the prior proceedings involved only state law claims. . . . In general, state courts of competent jurisdiction may decide federal claims, and their rulings on both state and federal issues have res judicata and collateral estoppel effect in later fedeeral proceedings." App. A-6 (citing *Migra*, 465 U.S. at 80-85).

The Ninth Circuit's opinion below even appears to indicate that it may not be possible to expressly reserve a federal taking claim in state court by means of an *England* reservation:

> In this case, there is no evidence in the record to support the application of any exception to the ordinary rules of claim preclusion. Springer argues that the district court erred in concluding that Springer had failed to preserve his federal takings claim for federal adjudication through use of an England reservation in the prior state court proceedings. However, *even if a taking litigant has this power, which is a question which we need not decide to resolve in this appeal*, nothing in the record suggests that we should question the district court's conclusion that Springer had failed to make the reservation.

App. A-6 (emphasis added).

B. The *Dodd* decision holds that, even if state courts assent to an *England* reservation of a federal takings claim, collateral estoppel may preclude its litigation in federal court.

A year previous to the instant decision, the Ninth Circuit had decided *Dodd*, *supra*. In that case, Mr. and Mrs. Dodd had expressly reserved their federal takings claims at every step of their state court litigation of takings claims brought under the Oregon Constitution, asserting a reservation under *England*. *Dodd*, 59 F.3d at 862. The county and State of Oregon had argued that the Dodds must have asserted both their state and federal claims in state court in order for the federal claim to be ripe in the U.S. District Court. Circuit Judge Aldisdert, sitting by designation, and writing for the majority, disagreed: "[T]o hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant." *Id.* at 860. An important element of the court's decision, he wrote, was its recognition that "the Oregon courts sufficiently reserved this [federal] issue by repeatedly acknowledging that the Dodds' federal constitutional claims were not before them and were pending in the federal district court." *Id.* at 862 (citation omitted).

Nonetheless, he went on to hold that litigation of the state claim in state court could have the effect of collateral estoppel on subsequent Fifth Amendment litigation in federal court:

> An important question that is yet to be decided by any court is whether the decision of the Oregon Supreme Court in *Dodd et al. v. Hood River County et al.*, 317

> Or. 172, 855 P.2d 608 (1993) on the taking questions presented by the Dodds under Article I, Section 18 of the Oregon Constitution was an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion.

Id. at 863.

In the end, he remanded the case back to the District Court to consider "in the first instance the merits of the issue preclusion contention . . .." *Id.* at 864.

C. The decision below, forcing Fifth Amendment takings claims into state court through claim and issue preclusion, raises an important federal question that should be settled by this Court.

The dispute in the U.S. District Court over whether a state claim was, or was not, raised in state court proceedings below only serves to obscure the central issue under the Fifth Amendment and this Court's decisions in *Hamilton Bank* and *England*. In the end, the decisions and record below indicate that a state law claim was raised in the Circuit Court, that a federal claim was expressly omitted from that proceeding, and that the state law claim was decided, the court holding that no regulatory taking had occurred. App. E-7.

Even if the U.S. District Court and the Ninth Circuit had agreed with that analysis (and they did not so agree), under the Ninth Circuit's decision below, Mr. Springer's federal claim still would have been barred. By the Ninth Circuit's analysis, failure to raise the federal claim in state court became res judicata, barring the claim from being asserted in federal district court. App. A-6 - A-7. The only

possible way to have avoided that outcome would have been for the District Court to have held that a valid *England* reservation had been taken, and agreed to, in state court proceedings. But then, under *Dodd*, the federal claim may well have been subject to collateral estoppel.

These decisions take this Court's decision in *Hamilton Bank* and distort it beyond all limits of fairness and justice. The decisions effectively construe the "just compensation" words of the Fifth Amendment to close the federal courthouse door to all federal taking claims against state and local governments. Mr. Kassouni, writing in 1992, foresaw this likelihood:

> The United States Supreme Court might have known that its "exhaustion of state remedies" requirement would effectively close the federal courthouse doors to aggrieved property owners. While the Supreme Court has not yet overruled *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, [166 U.S. 226 (1897)] which made the Just Compensation Clause applicable to the states through the Fourteenth Amendment, the res judicata effect of final state court judgments could do just that.

Kassouni, 29 Cal. W. L. Rev. at 43-44 (footnote omitted).

Mr. Springer respectfully urges this Court to grant the Petition to address this vital question of Fifth Amendment jurisprudence and to make clear that its *Hamilton Bank* ripeness decision, and its *England* decision, require litigation of only state constitutional claims in state court, and state denial of those claims neither bars nor precludes, under *Migra* and *Allen,* subsequent Fifth Amendment takings claims in

federal court.

II.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE FEDERAL COURTS REGARDING THE PRECLUSIVE EFFECT OF PRIOR STATE COURT ADJUDICATION OF STATE LAW TAKINGS CLAIMS IN STATE COURT

Federal circuit courts of appeal across the nation have construed the Takings Clause of the Fifth Amendment, as interpreted by this Court in *Hamilton Bank*, in widely varying ways when addressing the preclusive effect of state court litigation of state takings claims. Several circuits have made decisions with claim preclusion consequences resulting from finding that federal takings claims do not accrue for statute of limitations purposes until state law judicial procedures have been exhausted. Other decisions have addressed the effect of an *England* reservation on claim preclusion, and some have addressed claim preclusion in light of this Court's decision in *Allen v. McCurry*.

The Eleventh Circuit, in a 1990 decision, held that res judicata did not bar a federal takings claim where prior state court litigation raised only substantive claims regarding the validity of a local ordinance. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990). In *Corn*, the property owner brought a suit in state court, challenging the validity of city ordinances and the denial of his site plans. Although he asserted a taking claim under state law, he dismissed that claim in response to a city motion that a taking could not be determined until the

validity of the ordinances had been established. *Id.* at 586. Eventually, the state courts concluded the ordinances were invalid and ordered his plans approved.

When Corn brought suit in federal court for a temporary taking, the city argued that the failure of Corn to raise a taking claim in the state courts below barred his federal court taking claim under res judicata. The district court disagreed, and the Eleventh Circuit affirmed. After addressing the preclusion rule of *Migra*, *supra*, the court held:

> Res judicata does not apply here to bar Corn because the second cause of action (compensation for taking of property) is different from the first (mandamus attacking the validity of ordinances) and none of the issues now presented were actually litigated in earlier state proceedings. . . . . .
>
> Under both state and federal law, the taking claim is supplemental to the state proceedings on the propriety of the zoning regulation and is not mature until the propriety or impropriety of the zoning regulation has been finally determined.

904 F.2d 587 (citing *Macdonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986).[12]

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[12] The Supreme Judicial Court of Massachusetts has concurred with the *Corn* result. In *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992), *cert. denied* 113 S.Ct. 2338 (1993), the court held that, where litigants had brought substantive and regulatory takings constitutional challenges to a land use regulation in a first state proceeding, but the decision in that proceeding never reached the merits of the constitutional claims, subsequent takings claims in state court for

Thus, the court reasoned, the takings claim did not accrue until a state court judicial determination had been made on the validity of the zoning ordinances. Corn was not required to bring a federal takings claim in state court along with claims challenging the local decision's validity, and was not barred from asserting that federal claim in federal court.[13]

In *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (1993), *cert. denied* 114 S.Ct. 439 (1993), a different panel of the Eleventh Circuit confronted the issue of when a federal takings claim accrued and became ripe for adjudication in the federal courts. In a per curiam opinion, the court concluded that the federal takings claim did not accrue until a final determination by state judicial authorities had been made of the status of the property that was the subject of the claim. *Id.* at 1493.

Chief Judge Tjoflat specially concurred, and argued against the *Corn* holding that ripeness and accrual of a federal taking claim occurred only after final adjudication of state law claims by state court. He noted that he believed the *Corn* panel "incorrectly relied on *MacDonald* for the proposition that a federal cause of action is not available until after the state court determines the status of the

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damages were not barred because their "regulatory takings claim . . . is not mature until the validity of the challenged local regulation has been determined." Id. at 1273 (citing *Corn*).

[13] One difference between Oregon law and Florida law at this time was that Florida had no remedy at law for the compensable taking of property. Florida subsequently adopted such a remedy. *See Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994), *cert denied* 115 S.Ct. 1693 (1995).

property." *Id.* at 1497 n.8. He concluded that he believed that the *Corn* decision, by not holding a claim accrued upon a final administrative decision by "initial decisionmakers," "improperly expanded *Williamson's* [*Hamilton Bank's*] final decision requirement for purposes of determining the accrual date of a just compensation claim." *Id.* at 1498. The Chief Judge never addressed what the res judicata consequences would be if the federal claim accrued upon the final administrative decision rather than final adjudication.

The Court of Appeals for the Seventh Circuit similarly has held that a federal taking claim does not accrue until the state courts finally adjudicate whether compensation is due under state constitutional procedures. *Biddison v. City of Chicago*, 921 F.2d 724 (7th Cir. 1991). Analyzing this Court's decision in *Hamilton Bank*, Circuit Judge Flaum, writing for a unanimous panel, agreed with Biddison that "a fifth amendment taking claim does not 'exist' until the State denies just compensation, and that therefore the claim cannot accrue for purposes of the statute of limitations until the latter date." *Id.* at 728. The court went on to find Biddison's claim was not ripe because he had not brought a state law claim in state court. But, he concluded "His federal claim will ripen, and the statute of limitations will begin to run, if and when Biddison is denied just compensation by the state courts." *Id.* at 729.[14]

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[14] This holding is similar to the concurrence of Circuit Judge Reinhardt of the Ninth Circuit in the instant case below. Also relying on *Hamilton Bank*, he would have held Mr. Springer's federal takings claim was not ripe because he "failed to follow the procedure prescribed by the State of Oregon for seeking just compensation and, therefore, is foreclosed from raising his federal takings claim in federal court." App. A-8 (Reinhardt, J., concurring).

Within 19 months after the *Corn* decision, a third panel of the Eleventh Circuit tacitly assumed, without considering *Corn*, that federal takings claims accrued at the same time state law claims did, and could be barred by res judicata or collateral estoppel in federal court unless specifically reserved with an *England* reservation for litigation there. Senior Circuit Judge Johnson wrote for a unanimous panel, and examined the ripeness demands of the *Hamilton Bank* decision: "[T]he Williamson County Court failed to address the question whether the exhaustion of potential state remedies would also require plaintiffs with takings clause claims to litigate their federal takings clause claims in state court." *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1303 (11th Cir. 1992).

After recognizing that an *England* reservation "strictly speaking, is not applicable to a takings clause claim because a litigant cannot first file in federal district court," *Id.* at 1305, and distinguishing both *Allen v. McCurry* and *Migra*, *supra*, he concluded the Eleventh Circuit had construed *England* broadly, and held:

> [W]ould-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are "involuntarily" in the state courts, and therefore qualify for the exception to generally applicable res judicata principles.

Id. at 1306.

The Ninth Circuit's panels, on the other hand, have shown much more consistency on this issue. In *Palomar*

Mobilehome Park v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993), a unanimous panel, after citing *Allen v. McCurry*, *supra*, flatly rejected the argument that the federal taking claim cannot be barred because "the claim did not exist, or at least was not ripe, until the state court proceedings were terminated . . . ." *Id.* at 364. The panel concluded that the *Hamilton Bank* "requirement does not prevent the doctrine of res judicata from barring subsequent federal action." *Id.* The court also concluded that the "failure specifically to plead federal constitutional violations in the state court complaint does not affect the application of res judicata to this case." *Id.* at 365.[15]

In a 1982 decision, the Fifth Circuit squarely addressed the res judicata effect on a federal court proceeding of a prior state court action. *Southern Jam v. Robinson*, 675 F.2d 94, 95 (5th Cir. 1982). Southern Jam had gone to state court to challenge a county's adoption of a resolution restricting "mass gatherings." In that state court proceeding, Southern Jam had raised, inter alia, federal equal protection and due process constitutional claims. *Id.* at 95. The state court ruled for the county. Several years later, Southern Jam brought an action in federal court under 42 U.S.C. §§ 1983 and 1985(3), claiming First Amendment violations and Fourteenth Amendment violations for deprivation of property without due process. The district court dismissed the claims because of res judicata, and the Fifth Circuit affirmed. *Id.*

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[15] The court's decision appears also to have been predicated on the District Court's "conclusion that Palomar fully litigated its federal constitutional claims in the state court." 989 F.2d at 365.

The Fifth Circuit was troubled by what it saw as an apparent conflict between this Court's decisions in *England* and *Allen v. McCurry*. The court noted:

> The *McCurry* majority expressly held that § 1983 suits are not excepted from the statutory requirements of § 1738.
>
> We recognize that the Supreme Court has strongly impled otherwise. In *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 464, 11 L.Ed.2d 440 (1964) the Court said:
>
> > [A]ny conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled . . . to accept instead a state court's determination of those claims . . . would be at war with the unqualified terms in which Congress . . . has conferred specific categories of jurisdiction upon the federal courts . . ..
>
> We think this broad language in *England* is at odds with both *McCurry* and § 1738, and find it hard to reconcile them.

675 F.2d at 97 n.9 (citations omitted).

Nonetheless, the court concluded that Southern Jam's "present claim for money damages arose from the very occurrence which led to the state court proceedings against it [the county]. . .. Accordingly, the [County] Commission's res judicata defense prevails." *Id.* at 98.

These cases show there is a distinct split of opinion between the federal circuit courts of appeal on when federal takings claims arise under this Court's *Hamilton Bank* decision, and what preclusive effect state court litigation of state compensation claims may have on subsequent litigation of ripe federal takings claims in federal court. Indeed, there are even differences between different panels of the Eleventh Circuit on claim accrual and preclusion. The direct conflict presented by these cases on this significant issue should be resolved by this Court.

CONCLUSION

Mr. Kassouni begins his discussion of the pitfalls associated with the ripeness doctrine of "exhaustion of state compensation procedures" by discussing claim and issue preclusion: "*Williamson County's* second 'ripeness' requirement also raises troubling questions regarding res judicata and collateral estoppel. What is to prevent a federal district court from dismissing an inverse condemnation claim because the taking claim has already been defeated in state court?" Kassouni, 29 Cal. W. L. Rev. at 43.

The decision below of the Ninth Circuit holds that it not only may dismiss a ripe federal takings claim on the basis of res judicata, but that this Court's *Migra* decision (and indirectly its *McCurry* decision) requires such a result. To the extent that the Ninth Circuit recognized this Court's *England* opinion, it only saw it as standing for reserving a federal claim in state court - so that the claim could be struck down in federal court by collateral estoppel. The

effect of the decision is to belie the promise of *Hamilton Bank* that a federal forum is available to pursue a Fifth Amendment claim once seeking state compensation in state court has made that claim ripe.

This case is of great concern to takings claimants across the nation. As shown in the cases above, numerous federal courts of appeal have struggled to reconcile *Hamilton Bank* and *England* with Section 1738 and this Court's *Migra* and *McCurry* decisions. Inextricably linked to that struggle has been the question of when a federal takings claim accrues. If the federal claim arises only upon exhaustion of state compensation procedures, res judicata can never operate to bar that federal claim on the basis it should have been raised in the state proceedings. The Eleventh Circuit held just that in *Corn*. The Ninth Circuit held just the opposite in the instant case.

The decision below adopted by the Ninth Circuit completely bars the federal courthouse door to takings claimants forced into state court by *Hamilton Bank* who have not asserted an *England* reservation in state court. For those who do assert the reservation, the Ninth Circuit's *Dodd* decision then may bar litigation of the federal takings issues under collateral estoppel.

This Court's decisions regarding issue and claim preclusion in *Migra* and *McCurry*, interpreting 28 U.S.C. § 1738, and relied upon by the Ninth Circuit, should be interpreted by this Court in light of its *England* and *Hamilton Bank* decisions. Where it is plain from the record that federal takings issues were never decided on the merits in state court, but state compensation procedures were exhausted, this Court should hold that subsequent federal

takings claims in federal court not only are ripe, but also are subject to neither res judicata nor collateral estoppel. This constitutional question is an issue of exceptional importance and wide-ranging impact.

Petitioner respectfully urges this Court to grant the Petition for a Writ of Certiorari.

DATED: March 21, 1996.

Respectfully submitted,

*DAVID B. SMITH
**Counsel of Record*
6975 S.W. Sandburg, Suite 130
Tigard, Oregon 97223
Telephone: (503) 624-9352

APPENDIX A

FILED
AUG 24 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND SPRINGER,	)	
	)	
Plaintiff-Appellant,	)	CA No. 94-35137
	)	DC No. CV-92-6347-HO
v.	)	
	)	MEMORANDUM*
THE CITY OF BEND,	)	
An Oregon	)	
Municipal Corporation,	)	
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
For the District of Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Michael R. Hogan, District Judge, Presiding

Argued and Submitted June 5, 1995
Portland, Oregon

BEFORE: CANBY and REINHARDT, Circuit Judges, and LEGGE,** District Judge

Raymond Springer appeals the district court's grant of summary judgment in favor of the City of Bend in this action asserting a taking claim. We affirm.

BACKGROUND

Springer bought the property in question in 1978. In 1980, lumber companies deeded adjacent land to the city, allowing the development of S.E. Division Street. In 1983, Springer applied for a zone change from light industrial to commercial. The lumber companies initially opposed the zone change, but eventually an agreement was reached placing certain restrictions on Springer's land and providing that the land would not have access to S.E. Division Street. The city then approved the zone change.

In 1984, Springer asked the city to extend a street across his property to connect S.E. Second and S.E. Division Streets. The city denied the request because Springer had not sought the required county and state permits and because

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** Honorable Charles A. Legge, United States District Judge for the Northern District of California, sitting by designation.

denial was consistent with the city's driveway access policy. Springer appealed this decision to the Oregon Land Use Board of Appeals (LUBA), which affirmed the city's action in July 1985.

PRIOR LITIGATION

While the LUBA appeal was pending, Springer filed an action in the Deschutes County Circuit Court of the State of Oregon, seeking a declaratory judgment under Oregon law that the restrictions contained in the deeds from the lumber companies to the city were invalid. (Deschutes County I). In December 1985, that court granted the city summary judgment on the ground that there was no justiciable issue, because Springer had failed to obtain certain consents and approvals necessary to obtain any actual relief.

In July 1987, Springer filed claims in the federal district court for the District of Oregon alleging taking and equal protection violations under the federal constitution. The taking claim was dismissed without prejudice, because Springer had not ripened his claim by seeking compensation under state law. The equal protection claim was dismissed based on Springer's acknowledgment that it was precluded by Deschutes County I.

In May 1988, Springer returned to state court (Deschutes County II). He raised an inverse condemnation claim under the Oregon constitution and tort claims. Defendants were granted summary judgment on all claims. The inverse condemnation claim was precluded because it could have been brought in Deschutes County I and was not. The Oregon Court of Appeals affirmed, and the Oregon

Supreme Court denied review. Springer v. City of Bend, 111 Or. App. 136 (1992), review denied, 313 Or. 354 (1992).

THE CASE BELOW

Springer then returned to the federal district court. His complaint alleges that the city's various actions between 1980 and 1986, taken together, constitute a taking of his property in violation of the Fifth and Fourteenth Amendments. Springer argued that the city had turned his property into a pollution easement for the benefit of neighboring industrial properties, stripping his property of its viable economic use.

The district court found that all of the city's alleged actions occurred before Deschutes County II was initiated, and that the series of decisions and transactions out of which the federal claim arose was the same as that out of which Deschutes County II arose. The court concluded that when Springer brought the Deschutes County II action in 1988 alleging an inverse condemnation under Oregon law, he could have raised the federal taking claim. Because he failed to do so, his claim was precluded.

DISCUSSION

We review both summary judgment and res judicata determinations de novo. E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1287 (9th Cir. 1992).

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that federal courts "give to a state-court judgment the same preclusive effect as would be given that judgment under

the law of the State in which the judgment was rendered." Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Oregon courts adhere to standard principles of claim and issue preclusion. Dodd v. Hood River County, No. 93-35207, slip op. at 7633 (9th Cir. June 29, 1995) (citing Rennie v. Freeway Transp., 294 Or. 319 (1982)). The general rule in claim preclusion jurisprudence is:

> [A] plaintiff who has prosecuted one action against a defendant and obtained a valid final judgment is barred by res judicata from prosecuting another action against the same defendant where (a) the claim in the second action is one which is based on the same factual transaction that was at issue in the first; (b) the plaintiff seeks a remedy additional or alternative to the one sought earlier; and (c) the claim is of such a nature as could have been joined in the first action.

Dodd, at 7634.

In Dodd, the plaintiffs' federal takings claim was not subject to the general prohibition against claim-splitting because of two recognized exceptions. First, the defendants had consented to the splitting of the plaintiffs' claim between state and federal courts. Id. Second, the Oregon courts had reserved the federal takings issue for later determination. Id. at 7635. Because of these exceptions, the court did not need to "confront the Dodds' attempt to avert the pains of preclusion law through use of an England reservation, which typically is available to litigants that are in state court 'involuntarily' as a result of Pullman abstention by the federal court." Id. at 7635-36; see England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

In this case, there is no evidence in the record to support the application of any exception to the ordinary rules of claim preclusion. Springer argues that the district court erred in concluding that Springer had failed to preserve his federal takings claim for federal adjudication through use of an England reservation in the prior state court proceedings. However, even if a takings litigant has this power, which is a question that we need not decide to resolve this appeal, nothing in the record suggests that we should question the district court's conclusion that Springer had failed to make the reservation.

In its brief in support of its motion for summary judgment, the city argued that Springer's claim was barred by claim preclusion. (Ct. R. 10, at 10.) If Springer wished to present evidence or argument to the district court on the question of England reservation, he had an adequate opportunity to do so. In his opposition brief, Springer briefly addressed the question of claim preclusion. (See Ct. R. 18, Pl.'s Mem. in Resp. to Mot., at 34-35.) He argued, in effect, that claim preclusion cannot bar a federal court from adjudicating a federal claim, when the prior proceedings involved only state law claims. As Springer appears to recognize in this appeal, that contention is incorrect. In general, state courts of competent jurisdiction may decide federal claims, and their rulings on both state and federal issues have res judicata and collateral estoppel effect in later federal proceedings. See Migra, 465 U.S. at 80-85.

Springer could have presented his federal claim to LUBA, and to the state court in Deschutes County I. And this court cannot look behind the state court's decision to that effect in Deschutes County II. Springer's claim is now

precluded.

AFFIRMED.

REINHARDT, J., concurring:

I concur only in the result. I do not agree that Springer failed to preserve his federal claim in state court. To the contrary, I think its clear that he did. I would affirm the district court's decision on an entirely different ground. I conclude that Springer failed to follow the procedure prescribed by the State of Oregon for seeking just compensation and, therefore, is foreclosed from raising his federal takings claim in federal court.

In Williamson Co. Reg. Planning v. Hamilton Bank the Supreme Court held: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 105 S. Ct. 3108, 3121 (1985). In this case, Springer failed to use Oregon's procedure for obtaining just compensation. The trial court in Deschutes County II held that Springer's state inverse condemnation claimed was barred by res judicata, because this claim could have been -- but was not -- raised in Deschutes County I. The Oregon of Appeals affirmed this decision. 111 Or. App. 136, rev. denied, 313 Or. 354 (1992).

There can be no doubt that Oregon state law prescribes an "adequate" procedure for obtaining just compensation. Under Williamson, Springer was obligated to follow that procedure before raising his federal takings claim. By neglecting to raise his inverse condemnation claim in Deschutes County I, Springer failed to avail himself of the state procedure. Thus, we are foreclosed from considering his claim that the City's action violated the Just Compensation

Clause. In short, I conclude that Springer's claim never became ripe.

APPENDIX B

FILED
DEC 22 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND SPRINGER,	)	
	)	
Plaintiff-Appellant,	)	CA No. 94-35137
	)	DC No. CV-92-6347-HO
v.	)	
	)	
THE CITY OF BEND, an Oregon Municipal Corporation,	)	O R D E R
	)	
Defendant-Appellee.	)	

BEFORE: CANBY and REINHARDT, Circuit Judges,

and LEGGE,* District Judge

The panel has voted unanimously to deny the petition and supplemental petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition and supplemental petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Charles A. Legge, United States District Judge for the Norhtern District of California, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND SPRINGER,	)	
	)	
Plaintiff,	)	Civil No. 92-6347 HO
	)	
vs.	)	
	)	ORDER
THE CITY OF BEND,	)	
a political subdivision	)	
of the State of Oregon.	)	
	)	
Defendant.	)	
	)	

David C. Force
P.O. Box 10972
Eugene, Oregon 97440
Attorney for Plaintiff

James G. Driscoll
Robert J Schnack
Bullivant, Houser, Bailey, Pendergrass & Hoffman
300 Pioneer Tower
888 S.W. Fifth Ave.
Portland, Oregon 97204
Attorneys for Defendant

HOGAN, Judge:

The City of Bend (City) moves for summary judgment against Mr. Springer's (Springer) taking claim. For the reasons set forth below, the motion is granted.

BACKGROUND

This case arises out of actions taken by the City as well as other events affecting Springer's land that allegedly occurred between 1980 and 1986. Generally, Springer argues that the City turned his property into a "pollution easement" for the benefit of neighboring industrial properties, stripping his property of its viable economic use.

Springer bought his property in 1978. Affidavit of Raymond F. Springer filed in response to Motion for Summary Judgment, par. 3. In 1979, he petitioned the City and his property was annexed. Id. In 1980, according to the City,[1] lumber companies deeded adjacent land to the City, allowing the development of S.E. Division Street. Affidavit of John Hossick filed in support of Motion for Summary Judgment, par. 6. Springer contends that the deeds had no legal effect. The owners of the land reserved a one-foot strip of land separating S.E. Division from Springer's land. Id. at par. 8.

In 1983, Springer applied for a zone change from light

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[1] The parties dispute certain facts. However, summary judgement is appropriate because none of the disputed facts are material to disposition of the case.

industrial to commercial. Id. at par. 10. The lumber companies opposed the zone change but, after negotiation, Springer, the lumber companies and the City entered into an agreement (the Diamond Agreement) that placed certain restrictions on Springer's land and provided that Springer's land would not have access to S.E. Division. Id. The City then approved the zone change. Id. at par. 11. Springer now argues that he entered into the Diamond Agreement under duress.

Springer also applied in 1983 for a conditional use permit and a site plan to construct a bowling alley on his land. Id. at pars. 12, 13. The City approved both. Id.

In 1984, Springer asked the City to extend S.E. Urania Street across his property so that it would connect S.E. Second and S.E. Division streets. Id. at par. 14. The City denied the request because Springer had not sought the required county and state permits and because denial was consistent with the City's driveway access policy. Exhibits 1 and 2 to Affidavit of Ronald L. Marceau filed in support of Motion for Summary Judgment.

Following the City's denial of his request to extend a street across his property, Springer sought relief from the Oregon Land Use Board of Appeals (LUBA). Marceau Affidavit, par. 5. The appeals board affirmed the City's action in July 1985. Exhibit 3 to Marceau Affidavit.

While the LUBA appeal was pending, Springer sought a declaratory judgment in Deschutes County Circuit Court (Deschutes County I). Marceau Affidavit, par. 7. Specifically, Springer wanted a declaration that the

restrictions contained in the 1980 deeds were invalid. Id. The circuit court granted the City summary judgment finding that Springer had failed to obtain consents and approvals necessary to create a justiciable issue. Exhibit 4 to Marceau Affidavit.

In July 1987, Springer filed claims in this court for inverse condemnation and equal protection under the federal constitution. Exhibit 1 to Affidavit of James G. Driscoll filed in support of Motion for Summary Judgment. Because Springer had not ripened his claim by seeking compensation under state law for the alleged taking, the inverse condemnation claim was dismissed without prejudice. Driscoll Affidavit, par. 4. The equal protection claim was dismissed based on Springer's acknowledgment that it was precluded by Deschutes County I. Exhibit 2 to Driscoll Affidavit.

In May 1988, Springer again sought relief in Deschutes County Circuit Court by filing suit against the City and certain City officials (Deschutes County II). Driscoll Affidavit, par. 6. Springer raised an inverse condemnation claim under the Oregon constitution and tort claims. Id. Summary judgment was granted against Springer on all claims. Exhibit 3 to Driscoll Affidavit. The inverse condemnation claim was precluded because it could have been brought in Deschutes County I and was not. Id. at 4. The court also stated that Springer could not prevail on the merits of his taking claim. Id. at 5-6.

The Oregon Court of Appeals affirmed the Deschutes County II ruling and the Oregon Supreme Court denied review. Springer v. City of Bend, et al., 111 Or. App. 136 (1992), review denied, 313 Or. 354 (1992).

STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assn, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and identify those facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubt as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. T.W. Electrical, 809 F.2d at 630.

DISCUSSION

1. Application of Williamson Planning Comm'n v. Hamilton Bank

The City argues that, under Williamson Planning Comm'n v. Hamilton Bank, Springer cannot state a claim for a Fifth Amendment taking. That is, because Oregon law provides a remedy for inverse condemnation, no relief may be sought in federal court.

The City has misinterpreted the holding of Williamson. In that case, the Supreme Court held that a taking claim is not ripe until the landowner seeks compensation through state procedures. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985). "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195 (emphasis added).

Williamson does not preclude bringing a taking claim in federal court. Rather, it simply states that the plaintiff must ripen his claim before proceeding to federal court. The City makes no claim that Springer has not ripened his claim.

2. Claim Preclusion

The City next argues that Springer's taking claim is precluded by the prior legal proceedings before LUBA and Oregon state courts. Springer counters that this court is in no way bound by the determinations of Oregon courts.

"[A] federal court must give a state court judgment the same preclusive effect as would be given that judgment under

the law of the State in which the judgment was rendered." Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). In Migra, the Court extended the preclusive effect to claims that could have been litigated in the state proceeding but were not. Id. at 83-85.

There is no preclusion, however, if the party was not afforded a "full and fair opportunity" to litigate the claim or issue in state court. Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-81 (1982). That is, the state proceedings must satisfy the "minimum procedural requirements" of due process. Id. at 481-82.

If Springer's federal taking claim could have been raised in the earlier state proceedings and, under Oregon law, would now be precluded, his claim is barred under Migra.[2] See Palomar Mobilehome Park v. City of San Marcos, 989 F.2d 362 (9th Cir. 1993).

Under Oregon law, a claim arising out of the same factual transaction as an earlier claim can not be litigated subsequently, where the claim could have been adjudicated at

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[2] There is no argument that the state proceedings did not offer a "full and fair opportunity" to litigate the federal taking claim. In addition to holding that the inverse condemnation claim was barred by Deschutes County I, the Deschutes County II court held that Springer could not prevail on a taking claim. Exhibit 3 to Driscoll Affidavit. Moreover, there is nothing to indicate that the state proceedings violated the procedural due process to which a "full and fair opportunity" refers.

the earlier proceeding. Rennie v. Freeway Transport, 294 Or. 319, 333 (1982). The claims precluded are those "'with respect to all or any part of the transaction, or series of connected transactions' out of which the action or proceeding arose." Drews v. EBI Companies, 310 Or. 134, 141 (1990) (quoting Restatement (Second) of Judgments (1982) § 24 (1)).

Springer alleges in his complaint that the City took actions between April 27, 1980 and April 29, 1986 that constituted a taking of his property. All of the City's alleged actions occurred before the 1988 Deschutes County II case: the 1980 deeds; City approval of Springer's requested zone change in 1983 and the related ."Diamond Agreement;" City approval of Springer's requested conditional use permit and site approval for the construction of a bowling alley in 1983; and City denial of Springer's request for a street extension in 1984.

While the parties disagree as to the effect and relevance of these events, it cannot be disputed that this series of connected transactions is the same as those out which the Deschutes County II case arose. The Oregon Court of Appeals decision in that case stated that "[t]he genesis of his claims is a series of land use decisions and street conveyances under which plaintiff is permitted to operate a bowling alley on his property but has been denied the use of a street on one side of the property as an access road." Springer v. City of Bend, et al. , 111 Or. App. 136, 138 (1992).

When Springer brought the Deschutes County II action in 1988 alleging an inverse condemnation of his property under the Oregon Constitution and tort claims, he could have raised the federal taking claim. In fact, this court had

dismissed without prejudice Springer's federal inverse condemnation claim because no relief had yet been sought in state court.

To bar Springer's federal claim because he could have brought it in an earlier state proceeding may seem a harsh result. However, when this court dismissed his 1987 case and Springer returned to state court to prosecute Deschutes County II, he could have reserved his federal claim for federal adjudication by stating explicitly that he was seeking relief in state court for the limited purpose of ripening his claim for federal adjudication.[3] [3] See Migra, 465 U.S. at 85, n.7. He offers no evidence, nor does he claim, that he explicitly made such a reservation. See Palomar, 989 F.2d at 365 (noting that an implicit reservation is insufficient).

Because Springer's federal taking claim could have been brought in an earlier state proceeding and would be

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[3] The fact that Springer was forced to ripen his federal claim in state court does not change the claim preclusion analysis. In Palomar, the court held that the ripeness requirements of Williamson had no effect on the application of res judicata, citing the Supreme Court's pronouncement that the law does not afford "an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have engaged at all." Palomar, 989 F.2d at 364 (quoting Allen V. McCurry, 449 U.S. 90, 104 (1980)).

barred under Oregon law, the claim is now precluded.[4]

CONCLUSION

Defendant's motion for summary judgment is granted. This case is dismissed.

Dated this 27th Day of Jan., 1994.

/s/ Michael R. Hogan
Michael R. Hogan
United States District Judge

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[4] To the extent that Springer's complaint hints at an equal protection claim, that too is barred. In this court's Findings and Recommendation dated March 8, 1989, it recommended that Springer's equal protection claim be dismissed on summary judgment because, according to Springer's own admission, it was precluded by Deschutes County I. The case was dismissed.

APPENDIX D

111 Or. App. 136

Raymond F. SPRINGER, Appellant,

v.

CITY OF BEND, a municipal corporation; Art Johnson, City Manager; John Hossick, Planning Director; Brooks Resources Corporation; and DAW Forest Products Company, L.P.; a foreign limited partnership, Respondents.

88CV-0187-WE; CA A63397.

Court of Appeals of Oregon

Argued and Submitted June 18, 1991.

Decided Feb. 12, 1992.

Plaintiff brought action for inverse condemnation and deceit against city, its officers and two corporate defendants. The Circuit Court, Deschutes County, Stephen N. Titkin, J., granted summary judgment to defendants. Plaintiff appealed. The Court of Appeals, Joseph, C.J., held that inverse condemnation claim was barred by res judicata.

Affirmed.

Administrative Law and Procedure ⇨501
Judgment ⇨713(2)

Both circuit court and Land Use Board of Appeals (LUBA) had jurisdiction to try inverse condemnation claim when plaintiff had proceedings before those forums and

plaintiff's failure to raise inverse condemnation claim in those earlier proceedings barred, on res judicata ground, instant inverse condemnation action.

David C. Force, Eugene, argued the cause and filed the briefs for appellant.

Robert J. Schnack, Portland, argued the cause for respondents City of Bend, Art Johnson and John Hossick. With him on the brief were I. Franklin Hunsaker, James G. Driscoll and Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland.

G. Kenneth Shiroishi, Portland, argued the cause for respondent Brooks Resources Corporation. With him on the brief were Jonathan A. Bennett and Dunn, Carney, Allen, Higgins & Tongue, Portland.

Norman J. Wiener, James N. Westwood and Miller, Nash, Wiener, Hager & Carlsen, Portland, filed the brief for respondent DAW Forest Products Company, L.P.

Before Warren, Presiding Judge, and Joseph, Chief Judge, and Riggs, Judge.

JOSEPH, Chief Judge.

Plaintiff brought this action for inverse condemnation and deceit against defendant city, its officers Johnson and Hossick and two corporate defendants. The genesis of his claims is a series of land use decisions and street conveyances under which plaintiff is permitted to operate a bowling alley on his property but has been denied the use of a street on one

side of the property as an access road. This is the fourth judicial or administrative proceeding that plaintiff has instituted against some or all of these defendants. His earlier appeal to LUBA, his Deschutes County Circuit Court action and his federal court action resulted in dismissals or decisions adverse to him.

Defendants moved for summary judgment on the grounds, *inter alia*, that the inverse condemnation claim could have been but was not asserted in the earlier proceedings and is, therefore, barred by *res judicata* and that the deceit claim is barred by the applicable Statute of Limitations. The trial court granted the motions. Plaintiff appeals from the resulting judgment, and we affirm.

Plaintiff's first assignment of error is directed against the summary judgment on his inverse condemnation claim. Defendants and the trial court appear to have based their conclusion that the claim is barred by *res judicata* on all or some amalgam of the LUBA appeal and the 2 earlier judicial proceedings. We need consider only the state court action.

The principal argument that plaintiff makes to avoid *res judicata* is that the various proceedings that he brought fall between our decision in *Dunn v. City of Redmond*, 82 Or. App. 36, 727 P.2d 145 (1986), and the Supreme Court's decision that reversed us: 303 Or. 201, 735 P.2d 609 (1987). We held that issues that are, in substance, inverse condemnation claims are subject to exclusive circuit court jurisdiction and do not come within LUBA's jurisdiction. We reasoned that it made no sense for LUBA to decide issues for which it could not supply a meaningful answer or remedy. The Supreme Court disagreed. It concluded that, although

damages for inverse condemnation could only be recovered in a judicial action, "regulatory takings" issues could arise as constitutional questions and be relevant in LUBA's disposition of appeals from local land use decisions. The court concluded that inverse condemnation issues could be asserted in both forums.

The essence of plaintiff's reasoning is that, because of the two decisions in *Dunn v. City of Redmond*, *supra*, neither LUBA nor the circuit court had jurisdiction to hear inverse condemnation claims when he had proceedings before them; therefore, he could not have made the claims in the earlier proceedings and so he is not barred by *res judicata*. The premise of plaintiff's argument is confusing, because both the LUBA and the first circuit court proceeding were decided in 1985, before either appellate court issued an opinion in *Dunn*. Be that as it may, plaintiff's legal conclusion is wrong: Circuit courts have always had jurisdiction -- exclusive *or* concurrent -- to try inverse condemnation claims; neither opinion in *Dunn* did anything to change that, and both in fact reiterated it.[1] Plaintiff could have raised the claim in the earlier state court action, but he did not, and it is barred.

Plaintiff's second assignment challenges the summary judgment on the deceit claim. We reject the challenge without

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[1] The Supreme court suggested that there might be circumstances in which a circuit court must delay a decision on an inverse condemnation claim until LUBA has decided a corresponding issue that is pending before it. The LUBA appeal relevant to this case was decided before the circuit court action was decided.

discussion.

Affirmed.

APPENDIX E

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF DESCHUTES

RAYMOND F. SPRINGER,	)
	) No. 88CV-0187-WE
Plaintiff,	)
	) ORDER GRANTING
	) MOTIONS FOR
	) SUMMARY
	) JUDGMENT
v.	)
	)
CITY OF BEND, a municipal corporation, ART JOHNSON, City Manager, JOHN HOSSICK, Planning Director; BROOKS RESOURCES CORPORATION, an Oregon corporation; and DAW FOREST PRODUCTS COMPANY, L.P., a foreign limited partnership,	)
Defendants.	)

This matter having regularly come before the Court, the Honorable Stephen N. Tiktin presiding, on November 29, 1989, for hearing on the Defendants' respective motions for summary judgment;

And the Plaintiff appearing by and through his attorney, David C. Force, by telephone conference; and the Defendants City of Bend, Art Johnson and John Hossick

appearing by and through their attorney, James C. Driscoll; and the Defendant Brooks Resources Corporation appearing by and through its attorney, Jonathan A. Bennett; and the Defendant DAW Forest Products Company, L.P., appearing by and through its attorney, Norman J. Wiener;

And the Court having reviewed the materials submitted by the parties and having heard oral argument and being fully advised; and the Court having rendered its decision by telephone conference call with all counsel an December 1, 1989; now, therefore, it is hereby:

ORDERED that the Defendants' motions for summary judgment are granted.

DATED this 14th day of December, 1989.

/s/ Stephen Tiktin
Stephen N. Tiktin
Circuit Court Judge

Presented by:

James G. Driscoll
OSB No. 77166
Attorney for Defendants
City of Bend, Art Johnson and John Hossick

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF DESCHUTES

RAYMOND F. SPRINGER,	)
	)
Plaintiff,	)
vs.	) Case No.
	) 88-CV-0187-WE
CITY OF BEND, a municipal corporation, ART JOHNSON, City Manager, JOHN HOSSICK, Planning Director; BROOKS RESOURCES CORPORATION, an Oregon corporation; and DAW FOREST PRODUCTS COMPANY, L.P., a foreign limited partnership,	)
Defendants.	)
	)

TRANSCRIPT OF PROCEEDINGS

(Decision on Motion)

December 1, 1989

8:25 O'clock A. M.

BEFORE: THE HONORABLE STEPHEN N. TIKTIN
Circuit Court Judge of Deschutes County

APPEARANCES:

For the Plaintiff:	MR. DAVID C. FORCE Attorney at Law P. 0. Box 11723 Eugene, Oregon 97440
For Defendant City:	MR. JAMES DRISCOLL Attorney at Law 1211 S. W. Fifth Avenue #1400 Portland, Oregon 97204
For Defendant Brooks:	JOHN A. BENNETT Attorney at Law 1211 S. W. Fifth Avenue Portland, Oregon 97204
For Defendant DAW:	MR. NORMAN J. WIENER Attorney at Law 111 S. W. Fifth Avenue Portland, Oregon 97204
REPORTER:	MS. SHARON DAHLKE Deschutes County Reporter Deschutes County Courthouse Bend, Oregon 97701

TRANSCRIPT OF PROCEEDINGS

December 1, 1989
8:25 O'clock A. M.

THE COURT: All right. This is the time set for further proceedings in Springer versus City of Bend, et al, Case No. 88-CV-0187-WE, and specifically it's a time for the Court's ruling on the Defendants' Motion for Summary Judgment.

And I'm going to start with the City's Motion for Summary Judgment which regards the inverse condemnation claim.

First, I conclude that the six-year statute of limitations applies to that claim, not a two-year statute of limitations. And, therefore, that claim is not barred by the statute of limitations. However, I do find that the Plaintiff is precluded from bringing this inverse condemnation action in this court at this time.

I will make a couple of comments about why. And I want to indicate to everybody, and especially Mr. Force, that I spent almost the entire day yesterday reviewing this file and working on this and if I didn't feel I was ready to make these rulings today, I wouldn't do it. But I think I'm as fully advised as I can be and will ever be on these matters.

Now the taking in this matter, if any, was completed before the LUBA proceeding if LUBA upheld the City's position. Certainly, after LUBA reached its decision and the Plaintiff did not appeal that decision, the taking was ratified or at least fully completed. Because LUBA upheld the City's position, the taking was complete before circuit court case No. 1, which was a declaratory judgment action, and the

inverse condemnation case could have been litigated then and was not.

Now the federal court action also precludes the litigation of this inverse condemnation claim now.

In reviewing the tort claim notice which was filed -- not filed, but served by Plaintiff, and it's dated May 2nd, 1986, it's an exhibit to Mr. Driscoll's Affidavit, a couple of things are clear. At that time the Plaintiff alleges in his tort claim notice on Page 2 an involuntary taking of the use of the property without just compensation. And, of course, the Plaintiff followed up with a pleading of a claim under the Federal Constitution for the taking in federal court.

Now the Renne case, which was cited I think by -- it must have been by Mr. Driscoll -- it's Renne V. Freeway Transport, 294 Or 319, 1982, addresses this issue squarely and adopts the rule in cases where there's the possibility of pendent jurisdiction in federal court that the Plaintiff must at least attempt to have all claims arising out of the transaction adjudicated in the federal court. And if the federal court does not accept pendent jurisdiction, then the Plaintiff is protected when he later sues in state court.

In this regard the tort claim notice of May 2nd, 1986, specifically in the first full paragraph, indicates at the end of that paragraph that the notice is discussing claims, quote, "only insofar as necessary to give fair notice of tort claims that will arise in that case . . ." -- "that case" being the federal case -- then further quoting, ". . . as pendent claims under Oregon law." And so Plaintiff was aware of the, as he would have to be, of the pendent jurisdiction in the federal court and is now precluded from raising this issue in state court.

With regard to the merits, I find that the City and the Municipal Defendants must prevail also. It's clear from the

record that the City did approve the conditional use permit and the site plan; that the only denial that the City issued was access to Division Street. It's already been determined in res judicata fashion by LUBA and by the circuit court in Case No. 1 that there were other bases than the existence of this one-foot strip for the refusal to grant access to Division Street. Specifically those bases were failure of Plaintiff to obtain the necessary permits and there was also a finding that -- if I can find the right page -- it seems to me there was also a finding that there was -- this denial was based upon the City access plan for driveways -- regarding driveways. I'm not sure in this voluminous material I can quote that to you now. Well it is in the LUBA decision and it's addressed at Page 4 -- beginning on Page 4 of the LUBA decision.

I also don't believe that the City -- or that the Plaintiff can meet the criteria for a regulatory taking based upon the facts which I've already recited and the Plaintiff's deposition testimony.

And for those reasons I 'm going to give judgment in favor of all Defendants with regard to the First Claim for Relief in the Fourth Amended Complaint.

The next item I want to address is the fraud claim, which is the Second Claim for Relief, Counts 1 and 2.

First, I want to address this with regard to the City's defense that Mr. Springer failed to give tort claim notice within one hundred and eighty days of the discovery of the fraud.

This seems to be -- seemed to me to have been conceded, although Mr. -- if I recall, Mr. Force said he wasn't conceding it but then he went ahead and did concede it, virtually, in oral argument. And, in any event, I find that clearly there was no notice given within one hundred and eighty days of March I think it was 4th, 1988.

And I don't believe that the relation back doctrine applies for two reasons. One, I don't think that doctrine can obviate the need for the filing of tort claim notice. And, second, I don't think it's applicable in this case under the state of the pleadings and the facts.

There was no -- I don't believe Plaintiff addressed the tort claim -- specifically addressed the tort claim notice contention with regard to Count 2. But it was interesting to me in reading Count 2 that the Plaintiff alleges two kinds of violations which he says were discovered in February of 1989, several days before the Amended Complaint was filed. Some of those violations are violations of Oregon statute which relate to recording of certain instruments. And the allegation is that these instruments were executed and recorded in 1980.

The other allegation is in regard to the creating of a certain parcel of land, which are in the public records of the Deschutes County Assessor, by a partition. As I understand the Plaintiff's claim, the parcel of land would be the one-foot strip which would be an illegal partition.

Both of those allegations, the improper recording and the improper creation of the partition, are matters of public record. And it may well be that the discovery that there was a -- that the one-foot strip never existed occurred in March of 1988, but that doesn't excuse the Plaintiff from having notice of the contents of the official records in the Assessor's Office and the deed records prior to the time he says he discovered that.

It was also of interest to me in reading the tort claim notice again, carefully, that on Page -- and that notice was several years earlier -- or three years earlier almost -- that the Plaintiff, on Page 2, complains of -- I think it's on Page 2. Let me see if I can find it. Yes, the bottom of Page 2

complains about the recording and the allowing the creation of an unlawful partition three years earlier.

And so I find that the tort claim notice defense is applicable to the -- to Count 2, and the City is entitled to judgment on the Second Claim for Relief.

Now with regard to the other defense, I want to make this comment. Mr. Wiener argued that the Defendants -- or admitted that the Defendants had -- his client had contended all along that it owned a one-foot strip. And the record is clear on that. But Mr. Wiener went on to indicate that the mistaken --well, one, that they're not conceding that they don't own it and, two, that if they don't, they're in the mistaken belief that they don t. And while Mr. Wiener is right that that's -- if that's true, that doesn't constitute fraud, I can't base my decision on that at this time. That doesn't appear to the Court from the record that there was a -- either that the one-foot strip does exist or that there's a mistaken belief.

So I think the issue then comes down to, in my opinion, whether Plaintiff is precluded from litigating the fraud claim at this time. And I guess I'm going to address that, and what I say now would be as applicable to the City claim on the preclusion issue as they are to the claims against the other two Defendants.

I, again, have gone back and looked at the tort claim notice of May 2nd, 1986, and the entire record, and it's clear to the Court that the basic set of operative facts which give rise to the claims in the current Complaint were in existence and known to the Plaintiff many years ago, apparently at the time of the LUBA -- the appeal to LUBA, and certainly at the time of the -- well, the appeal to LUBA, the prior circuit court case, and certainly the -- clearly at the time of the tort claim notice on May 2nd. I'm not going to reiterate

everything that the tort claim notice says in that regard. It stands -- or speaks for itself.

I then looked to the Plaintiff's Affidavit attached to his response to Motions for Summary Judgment and became confused by that. It appears on the one hand that Plaintiff wanted to allege a new discovery on March 4th, 1988 in order to withstand a statute of limitations or a tort claim notice challenge. But recognizing that that was not -- might not be successful, in Paragraph 4 he further alleges that those matters which were discovered on or about March 4th, 1988 in their present form were encompassed within claims already pleaded for other remedies. In a sense this constitutes an admission of the preclusion doctrine.

To the extent that the one-foot strip is an issue at all, there was no reliance on it by the City or LUBA or the circuit court, and that issue has been decided with res judicata affect.

Plaintiff's access to Division Street might eventually have been denied because of the alleged one-foot strip, but Plaintiff had not -- did not pursue the matter in the appropriate way and that was the finding, for instance, at the LUBA hearing.

Now the Springer agreements are clearly designed -- well, I shouldn't say clearly designed, but they could certainly be construed to create a pollution buffer and they certainly were designed to have the effect of prohibiting the limitation of the operations of the mills for pollution reasons. But Plaintiff had complained about this years before, and in his tort claim notice he specifically refers on Page 2 to the creation or imposition of a pollution easement.

So I find that the Plaintiff is precluded from now litigating the matters which are contained in his Second Claim for Relief, and I'm going to give judgment to all Defendants

on the Second Claim for Relief.

Have I forgotten to rule on anything?

MR. DRISCOLL: Your Honor, this is Jim Driscoll. I think you covered them all.

THE COURT: Mr. Force?

MR. FORCE: I think they're all covered, too.

THE COURT: All right. I'm going to ask -- do we need more than one document encompassing all these rulings? I don t think we do.

MR. FORCE: I think just one.

THE COURT: And why don't I have Mr. Driscoll prepare that.

MR. DRISCOLL: All right. Your Honor, it would be my intention to simply prepare a judgment rather than a written statement of findings and conclusions.

THE COURT: I'd prefer that, too. And you can -- why don't you do this.

MR. DRISCOLL: We've had this recorded. And if anyone ever wants to know exactly what you said this morning, we can simply get the transcript.

THE COURT: I think that's a better practice. Let's do this.

Why don't you prepare an order allowing the Motion

for Summary Judgment, and then a judgment, and send them both down to me for signature?

MR. DRISCOLL: Fine. And I'll send those out to everyone. And if you'll wait for five or six days for possible objections, and then if you don't hear anything, go ahead and sign them

THE COURT: All right. I want to tell Counsel that this case was well litigated by everybody. It was an interesting case of no small importance to all the parties, and that was obvious from the way it was handled by all Counsel and I appreciated that

MR. FORCE: Thank you.

MR. DRISCOLL: Thank you, Your Honor. And we appreciate it too, Your Honor

THE COURT: All right. Then I guess if there's nothing further, we'll be in recess.

MR. FORCE: Thank you.

MR. DRISCOLL: Thank you, Your Honor.

(Court was adjourned.)

APPENDIX F

U.S. DISTRICT COURT
DISTRICT OF OREGON
SOUTHERN DIVISION
FILED
JUN 30, 1988
ROBERT M. CHRIST, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND F. SPRINGER,	)	
	)	
Plaintiff,	)	Civil No. 87-6342
	)	
v.	)	ORDER and
	)	FINDINGS AND
	)	RECOMMENDATION
JOHN HOSSICK and THE CITY OF BEND,	)	
	)	
	)	
Defendants.	)	

David Force
Attorney at Law
P.O. Box 11723
Eugene, Oregon 97440

Allen Johnson
Attorney at Law
767 Willamette, Suite 203
Eugene, Oregon 97401

ATTORNEYS FOR PLAINTIFF

Ronald Bailey
James Driscoll
Attorneys at Law
1400 Pacwest Center
1211 SW Fifth Avenue
Portland, Oregon 97204-3797

R.L. Marceau
Attorney at Law
835 NW Bond Street
Bend, Oregon 97701

ATTORNEYS FOR DEFENDANTS

HOGAN, Magistrate:

Plaintiff moves (#20) to dismiss this case without prejudice. Defendants move for summary judgment (#10).

1. The "taking" claim

The parties agree that Plaintiff's first claim for relief (Fifth Amendment "taking claim") is not ripe for review. Plaintiff's motion (#20) should be granted on the first claim and defendants' motion (#10) should be denied as moot on the first claim.

2. Equal protection claim

Defendants contend that plaintiff's second claim for relief (Fourteenth Amendment Equal Protection claim) is "ripe" for review and that the court should decide it now. Based on the present record, I find that plaintiff's equal protection claim is ripe for review by this court.

A claim that a state government's zoning or land use decision violates equal protection is "ripe for review when the government makes a final decision "which inflicts a concrete harm upon the plaintiff landowner." Herrington v. County of Sonoma, 834 F.2d 1488, 1494 (9th Cir. 1988). This "final decision requires at least: '(1) a rejected development plan, and (2) a denial of a variance.'" Herrington, supra citing Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454 (9th Cir. 1987). Equal protection claims are ripe even though the plaintiff had not reapplied to the government for a less intensive development, Herrington, 834 F.2d at 1497, or sought adequate state compensation, as required for a "taking" claim. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) and Herrington, 834 F.2d at 1499 n.10.

The present record reflects that the City of Bend did make a "final decision," as defined in Herrington, regarding plaintiff's application for street access. Current case law does not require plaintiff to exhaust his state judicial remedies on the equal protection claim before it is ripe for review in federal court.

Plaintiff has submitted a copy of a new complaint in an action against these defendants in an Oregon court. This new complaint does not contain an equal protection claim.

Therefore, plaintiff's motion (#20) to dismiss the equal protection claim should be denied. Plaintiff is allowed 20

days to respond to defendants' motion for summary judgment (#10), which shall be recalendared for the not for oral argument calendar after the expiration of 20 days.

DATED this 30th day of June, 1988.

/s/ Michael R. Hogan
UNITED STATES MAGISTRATE

Any objections to this Findings and Recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.

APPENDIX G

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF DESCHUTES

RAYMOND F. SPRINGER,	)	
	)	
Plaintiff,	)	Case No. 37779
	)	
vs	)	MEMORANDUM
	)	OPINION
	)	
CITY OF BEND, etc., et al.,	)	
	)	
Defendants.	)	

This matter comes before this Court upon defendant City of Bend's motion for summary judgment. Plaintiff's second amended complaint seeks declaratory relief that a deed from Brooks Resources to the City contains an invalid reversionary clause. The facts are as stated in a LUBA decision involving the parties which upheld the City's denial of an application to dedicate a street.[1] Here, the issue is

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[1] "Petitioner and Deschutes County were co-applicants to dedicate a street. The proposal would extend Urania Avenue westerly from Second Street to Division Street through petitioner's property.

"Prior to 1980, Division Street was a private road. The portion of Division Street relevant in this appeal was owned by a private corporation, Brooks-Scanlon, Inc. In April, 1900, Brooks-Scanlon, Inc. conveyed the tract which

whether there exists a justiciable controversy as required by ORS 28.060.[2]

In 1000 Friends of Ore. v. Deva, 34 Or App 755 (1983), the Court of Appeals affirmed a trial court's decision to grant summary judgment when the relief sought by plaintiff depended upon a favorable decision in another case pending before LUBA. It held that no justiciable controversy existed

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includes Division Street to the city. However, Brooks-Scanlon, Inc. did not convey all of the property it owned along the length of Division Street. The property description excluded a one foot strip along the east side of Division Street adjacent to petitioner's property. The one foot strip now separates petitioner's property from Division Street, and the present owner, Daw Forest Products, objects to the Urania Avenue extension. In addition, the deed was subject to the following:

"No access to or from said land on the east and west side is permitted except Grantor, its successors and assigns reserves two access points to any future roadway from the west side of said land."

"Division Street is now a state highway. The city limits are along the west boundary of petitioner's property which is entirely within the city. The one foot strip and the portion of Division Street relevant to this appeal are outside the city."

[2] "28.060 Discretion of court to refuse judgment or decree. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

when relief was based on future or hypothetical facts. See also Brown v. Oregon State Bar, 293 Or 446, 449 (1982).

In this case, the declaration sought by plaintiff affords him no relief unless he can (1) obtain DAW's consent to dedicate the land between Division Street and Urania Avenue, (2) obtain approval from the State Highway Commission to provide for access to Division Street, and (3) obtain favorable approval from Deschutes County and the City of Bend for the extension of Urania Avenue. In keeping with the policy underlying ORS 28.060, there is no reason to entertain jurisdiction until at least the first two conditions have been met. Motion allowed. Counsel for City of Bend may present an appropriate order.

Dated this 17 day of December, 1985.

/s/ Walter I. Edmonds, Jr.
WALTER I. EDMONDS, JR.
Circuit Judge

APPENDIX H

RAY SPRINGER,
Petitioner,

vs.

BEND CITY COMMISSION,
Respondent,

and

DAW FOREST PRODUCTS L.P.,
Respondent-Intervenor.

LUBA No. 85-027

Appeal from Bend City Commission.

Allen L. Johnson, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief were Sullivan, Josselson, Roberts, Johnson & Kloos.

Ronald L. Marceau, Bend, filed a response brief and argued on behalf of Respondent Bend City Commission. With him on the brief were Gray, Fancher, Holmes & Hurley.

Robert S. Lovlien, Bend, filed a response brief and argued on behalf of Respondent-Intervenor Daw Forest Products.

DuBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee; participated in the DECISION.

AFFIRMED 07/16/85.

1,2. Administrative Law - Denials.

City's denial of a permit application will be upheld where findings show applicable criteria were not satisfied.

Opinion by DuBay.

NATURE OF THE DECISION

Petitioner appeals the decision of the Bend City Commission denying an application to dedicate a street.

FACTS

Petitioner and Deschutes County were co-applicants to dedicate a street. The proposal would extend Urania Avenue westerly from Second Street to Division Street through petitioner's property.

Prior to 1980, Division Street was a private road. The portion of Division Street relevant in this appeal was owned by a private corporation, Brooks-Scanlon, Inc.[1] In April, 1980, Brooks-Scanlon, Inc. conveyed the tract which includes Division Street to the city. However, Brooks-Scanlon, Inc. did not convey all of the property it owned along the length of Division Street. The property description excluded a one foot

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[1] The portion of the private road not owned by Brooks-Scanlon, Inc. was owned by a related corporation, Brooks Resources, Inc.

strip along the east side of Division Street adjacent to petitioner's property.[2] The one foot strip now separates petitioner's property from Division Street, and the present owner, Daw Forest Products, objects to the Urania Avenue extension. In addition, the deed was subject to the following:

> "No access to or from said land on the east and west side is permitted except Grantor, its successors and assigns reserves two access points to any future roadway from the west side of said land. "[3]

Division Street is now a state highway. The city limits are along the west boundary of petitioner's property which is entirely within the city. The one foot strip and the portion of Division Street relevant to this appeal are outside the city.

FIRST ASSIGNMENT OF ERROR

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[2] We understand from the record that the grantors did not convey the one foot strip as a device to control access to Division Street. Record 69-71.

[3] After commencement of the road dedication proceedings by the city, petitioner filed with the circuit court a petition for declaratory relief and a petition for an alternative writ of mandamus. The petition requested a declaration that the deed provisions restricting access have no effect and that an alternative writ of mandamus requiring the state to approve the proposed dedication. After commencement of this litigation, the county withdrew as co~applicant in the city's road dedication proceedings. The court proceedings are still pending.

Petitioner alleges the decision is erroneous because the county misconstrued the applicable law, exceeded its authority and made improper findings in denying the application. The principal target of petitioner's arguments is the city's reliance on the deed restrictions and the lack of contiguity between petitioner's property and Division Street as bases for the decision. Petitioner says the deed restrictions may not be relied on and that by honoring them the city has violated ORS 227.173(1).[4] Petitioner also claims the one foot strip was created in violation of state and county regulations controlling partitions, and therefore cannot be a basis for the decision.

It is significant that the city's decision does not depend on these two factors as justification for the denial. The city's order states:

> "This matter is controlled by Ordinance No. NS-1349 which requires in Article III that a person desiring to create a street shall make written application, pay the appropriate filing fee *and obtain the necessary permits if access to a county road or state highway is*

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[4] ORS 227.173(1) states:

"(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

planned." (Emphasis supplied) Record 2.

1 The city found the petitioner had not obtained permits from Deschutes County or the State Highway Division for access to Division Street. This uncontested finding is by itself sufficient to support the city's denial since it shows a necessary criterion was not satisfied. *Heilman v. City of Roseburg,* 39 Or App 71, 591 P2d 390 (1979). *Marracci v. City of Scappoose,* 26 Or App 131, 552 P2d 552 (1976), ' *Weyerhaeuser v. Lane County,* 7 Or LUBA 42 (1982).

In addition to basing the denial on the applicant's failure to meet the permit requirement above described, the city also relied on its comprehensive plan policies regarding arterial streets. Division Street is designated as an arterial street[5] and the findings point out two policies in the plan that the city deemed pertinent.[6] These policies emphasize that

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[5] An arterial street is defined in the city's subdivision ordinance as "a restricted access street of substantial continuity which is primarily a traffic artery for intercommunication among large areas, and so designated by the city of Bend.

[6] Policies 4 and 5 of the Commercial Areas section of the city's comprehensive plan state as follows:

"4. It is the intent of the plan to allow commercial development adjacent to arterials and highways, provided that the developments access onto frontage roads or interior roads, and that access onto the highway or arterial will be limited. Points of access will be encouraged that provide for adequate and safe entrances and exits and that favor right turns and merging over the use of signalization

access to arterial streets should be limited. We note too that Policy 3 of the Commercial Areas section of the plan explains that access limitations and other traffic management mechanisms should be used "to avoid problems associated with strip development, *i.e.*, congestion caused by turning movements, too much access to the arterial street or highway." Bend Area General Plan, Commercial Areas, Policy 3.

The city found Division Street was constructed as an arterial street with as few connections as possible and that the proposal would be contrary to the original concept of Division Street because it would create an additional point of access. The city also rejected the applicant's claim that opening the street would not have a significant impact on traffic flow. The city found the claim is not supported by any traffic study.

We accept the city's contention that the cited plan policies are relevant to the proposal and that the policies justify the action taken by the city.

Petitioner argues, however, the findings are unsupported by substantial evidence because they fail to address other evidence favoring the street extension.

"5. The zoning and subdivision ordinances are intended to provide the city and county the tools to regulate the growth of the Bend area in a positive way. In the use of these tools, the city and county shall apply access control, dedication for wider streets, wider setbacks, street improvements, such as left turn refuges, medians, frontage roads, and reverse frontage to maintain a function of the collector, arterial and highway to improve traffic."

Petitioner points to a statement in the record attributed to a state highway department engineer that the connection would improve traffic circulation. We reject petitioner's argument. There is substantial evidence in the record to support the decision. The city is not required by ORS 197.835(8) (a) (C) (substantial evidence rule) to address contrary evidence in its findings. *Ash Creek Neighborhood Association v. City of Portland,* __ Or LUBA __ (1984) (LUBA No. 84-061, Slip Opinion dated November 2, 1984); *Morse v. Clatsop County,* Or LUBA __ (1984) (LUBA No. 84-026, Slip Opinion dated August 30, 1984). Even if it were required to address such evidence, the city's findings that the conflicting evidence was unsupported by any traffic study is sufficient explanation why such evidence was not accepted.

We deny this assignment of error because the findings show some of the applicable criteria were correctly considered by the city and found not satisfied by the proposal.

THE SECOND AND THIRD ASSIGNMENTS OF ERROR

2 Petitioner challenges the decision as violating a variety of constitutional, statutory and ordinance provisions. Again, the city's recognition of the deed restrictions and the one foot strip are the targets of these challenges. However, as we have already stated the city's decision can be upheld on other grounds. Despite petitioner's arguments, we do not construe the city's order to treat either the deed restrictions or the one foot strip as necessary bases for the decision. We understand the county's order to refer to these matters by way of explaining why the road approach permits for access to the state highway were not obtained. Since the order places reliance on criteria other than those petitioner claims were

improperly considered, the challenge to the decision must fail. We therefore deny this assignment of error.

Affirmed.